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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

Nos. 528-533

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

S. COLUMBUS WELCH

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

JOHN BURNS, ET AL.

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

FRED LOLLIS, ET AL.

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

ARNOLD E. BRADSHAW, ET AL.

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

PHILIP G. RUST, ET AL.

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

ABRAHAM COLE HYATT, ET AL.

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The Opinion of the Circuit Court of Appeals (R. 201-210) is reported in 150 Fed. (2) 613. The Opinions of the District Court (R. 12-21) are not reported.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on July 21st, 1945 (R. 210, 212-214, 215, 216, 217 & 219). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. C. A., Section 347).

Question Presented

The question involved is whether T. V. A. is authorized by law to condemn the Respondents' lands, which, concededly, it does not need for any purpose in the construction, operation or maintenance of its Dam, but which it seeks to acquire to convey to the Department of Interior for park purposes, and thus to settle T. V. A.'s liability to the State of North Carolina, to Swain County and to these Respondents, for flooding a highway.

Statute Involved

The Tennessee Valley Authority Act of 1933, with its several amendments (48 Stat. 58, 49 Stat. 1075, 53 Stat. 1083, 54 Stat. 611, 55 Stat. 599, 575—16 U. S. C. A., Chapter 12A) is quoted in full in R. 107-159. (See Appendix hereto for quotations of those sections of the Act alleged to be pertinent here.)

Statement

Pursuant to the powers granted to it by the Act, the Tennessee Valley Authority, hereafter called "T. V. A.", acquired certain lands in the western part of North Carolina adjoining the Little Tennessee River and constructed what is now known as the Fontana Dam and Reservoir. The dam is about twenty miles westerly from Bryson City, North Carolina, near the North Carolina-Tennessee State line, and the reservoir is immediately to the east of the dam.

By the time of the hearings in these proceedings in the District Court, T. V. A. had acquired the title to all of the land needed or sought for the dam and the reservoir, and, in fact, had completed the construction of both of them (R. 7, 6).

Immediately prior to the construction of the Dam and the flooding of the reservoir, there had been located along and near what has since become the northerly boundary of the reservoir, a road, known as Highway No. 288. The road was entirely within Swain County, North Carolina, and extended from Bryson City westerly along or near the north bank of the Little Tennessee River to a point near the present site of the Fontana Dam, a distance in all of about twenty miles, as the crow flies, about forty or fifty miles by the road, 288.

Between Highway 288 on the South, and the southern boundary of the Great Smoky Mountains National Park on the North, is an area consisting of approximately 44,000 acres of land (See Map, R. 222); and when T. V. A. began the Fontana Project, about two hundred and sixteen families lived there. The lands of all of these respondents are located there (See Plats shown in orange on Map, R. 222). Highway 288 was the only practical means of access to those properties.

It appeared to T. V. A. that the reservoir would probably flood a part of Highway 288. Consequently, it sought to reach an "agreement of settlement between the Tennessee Valley Authority, the State of North Carolina, and Swain County to satisfy the liability of T. V. A. to the State of North Carolina and to the landowners whose means of access was to be destroyed by the flooding of Highway 288." For that purpose, T. V. A. entered into a contract, on July 30, 1943, with the State of North Carolina, the Department of the Interior of the United States of America, and with Swain County (R. 167-187).

None of the landowners are parties to the contract, and there is nothing in the record in any of these cases to indicate that any of them participated to the slightest extent in any of the negotiations or conferences which culminated in the contract.

The contract provided, among other things, that T. V. A. would save the State of North Carolina and its public agencies harmless from any claim which might be asserted against them for damages sustained as a result of the submerging of Highway 288; that T. V. A. would acquire, by purchase or condemnation, title to *all* of the 44,000 acres, i. e. the entire area between Highway 288 and the southern boundary line of the Great Smoky Mountains National Park, except about 2,000 acres owned by North Carolina Exploration Company; that when thus acquired, the entire area except the very small portion to be flooded by the reservoir, would be conveyed to the Department of the Interior to become a part of the Great Smoky Mountains National Park; and that the Department of the Interior would construct a modern highway through the area, from Bryson City to a point at or near the Fontana Dam, when the funds therefor should be made available by appropriation of Congress (R. 170); that T. V. A. would pay $400,000.00 to Swain County (that being the outstanding balance on certain bonds theretofore issued to raise funds for the construction of Highway 288); and that the State of North Carolina would contribute $100,000.00 to T. V. A. to aid the latter in making the payment of the $400,000.00 to the County (R. 103-105, also 167-187).

The only other pertinent facts are those which relate specifically to the lands of these respondents.

None of the lands sought to be condemned in any of the six consolidated actions have any physical connection with the Fontana Dam or its reservoir (except one and one-half

acres of the Welch lands, which were required for the reservoir but have been eliminated from this proceeding by a tender of a deed conveying them to T. V. A.) (R. 28). In fact, it is conceded by the petitioner that the purpose of condemning these lands was to acquire them for the Park and thus to extinguish T. V. A.'s liability for flooding 288.*

The respondents Welch and Burns have waived all rights to claim any damages from T. V. A., the United States of America, the State of North Carolina or its Public Works Commission, or from Swain County, "on account of any impairment, interference, or injury" to their respective properties resulting from the flooding of Highway 288. These respondents have agreed, in their respective answers herein, to file formal waivers to that effect (R. 13, 14).**

The lands of the respondents Lollis, Bradshaw, Rust and Hyatt, are located at distances varying from a half-mile to four miles from the high water mark of the reservoir (R. 37, 38).

The Rust lands (approximately 4,500 acres of the 6,000 acres, more or less, involved in this proceeding) adjoin the Great Smoky Mountains National Park (R. 37). They are located at distances varying from one-half mile to four miles from the high water mark of the reservoir (R. 37). Nolands Creek flows southerly from the Park through the Rust land and into the Little Tennessee River (See Map, R. 222). Several families reside in the Nolands Creek settlement, and travelled to and from their homes on a modern road which parallels the Creek and extends to Highway 288 (Map, R. 222).

Parts of the Rust land have been improved by private roads and modern residences. They have been piped with

* R. 39, 40—Finding of Fact 37.

** This is provided in both the Welch and Burns judgments in their respective cases. (See R. P. 1, 2, 3, 4, and 5.)

running water, and are equipped with electricity generated by the Rust power-plant. The property has been used extensively for the growing of timber.

The land of the several other respondents is used chiefly for farming.

After T. V. A. had *purchased* approximately 38,000 acres in the 44,000-acre area (i. e. practically all of the land westerly from Grey Wolf Creek and Forney's Creek to Deal's Gap) (Again see Map, R. 222), it sought to condemn the lands of these respondents, which are located almost entirely in the portion of the area lying easterly from Forney's Creek and between that point and Bryson City, a distance of from five to eight miles (R. 33 and 39).

All of the respondents moved for dismissal of the condemnation petitions, on the ground that there exists no legal basis or authority for the condemnation of their lands, since no part of any of those lands or the material thereon was, or is needed or sought for any use authorized by the Act.

After full hearings, arguments, and the filing of Briefs, the petitions for condemnation were dismissed by the District Court; and its decision was unanimously affirmed by the Fourth Circuit Court of Appeals (150 F. (2) 613, R 201 and 210).

Argument

In approaching the legal question, it is, of course, essential to look not merely at the facts with respect to the 44,000-acre tract in its entirety, but to bear in mind the particular circumstances surrounding the lands here sought to be condemned, as they prevailed when these proceedings were heard below, and, at present. We have pointed out that the titles to all of the tracts, consisting of 44,000 acres in the aggregate, except about 6,000 acres, have been acquired, and, in fact, had been, prior to the District Court hearings

in these proceedings. None of the lands here involved (except that portion of the Welch lands already eliminated from these proceedings) have any physical connection with the dam or reservoir nor will they be used in its operation or maintenance. Welch and Burns have released their claims for damages for loss of Highway 288. All of Respondents' lands except the Welch tract lie easterly from Forney's Creek, and, at a relatively very short distance from Bryson City. The purpose of acquiring the area which includes respondents' lands was to convey it to the Interior Department, for the Park, and thereby to extinguish or eliminate T. V. A.'s liability for flooding 288.[1] The importance of these facts will appear when we reach the petitioner's contention that condemnation of these properties can be justified on grounds of convenience and economy.

(A) Reply to Petitioner's Alleged Reasons for Certiorari

Petitioner has advanced four propositions as bases for its application for the Writ.

(1) The first of its contentions is that the decision of the Fourth Circuit Court of Appeals, in affirming the dismissal of the condemnation petitions in the instant case, is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *U. S.* v. *Meyer*, 113 F. (2) 387, cert. denied, 311 U. S. 706.[2]

The *Meyer* case involved the Rivers and Harbor Act of April 24, 1888, c. 194, 25 Stat. 94, 33 U. S. C. § 591, which authorizes the Secretary of War to acquire by condemnation any land needed to enable him to maintain, operate or

[1] R. 39, 40—Finding of Fact 37.

[2] This reason (numbered one) is carried over into the discussion of petitioner's reason numbered two and is discussed there as well as under number one.

prosecute works for the improvement of rivers and harbors, for which provision has been made by law. The Secretary of War sought to condemn the fee to the lands of the defendants. They resisted, contending that the Secretary's action was not characterized by good faith but constituted an abuse of his discretion, for the reason that a title in fee simple was not necessary for the accomplishment of the purpose of the project. Defendants offered in evidence a letter from the Chief of Engineers of the War Department to a Senator, in which—to use the language of the Seventh Circuit Court of Appeals—"the writer indicated that in the pools of the lower reaches of the improvement, some of the lands to be acquired would no doubt be desired for development of parks and recreational facilities and stated that the land would be permanently *under water*, and that in the interest of the users of the resulting pools for navigation, recreation and police of their shores, it was considered desirable for the Federal Government to obtain more than a flowage easement and that, therefore, a fee simple title should be acquired." (Emphasis supplied.) The factual bases for the decision of the Circuit Court of Appeals in the *Meyer* case are stated in its opinion as follows (113 F. (2) at p. 392):

> "It should be observed first that the letter was incompetent as evidence, for the reason that it was not written by the official who had the burden of determining the question of necessity but by a subordinate agent with whom the Secretary may or may not have agreed. The opinions of such third persons are of no avail to impeach the integrity of the responsible official. Moreover, nothing in this document impeaches the original purpose, namely, betterment of navigation and flood control. Old Dominion Land Co. v. United States, 4 Cir., 296 F. 20, affirmed 269 U. S. 55, 46 S. Ct. 39, 70 L. Ed. 162. The evidence in the record, including that tendered by defendants, tends to disclose only a differ-

> ence in judgment as to the necessity of a fee simple title,—nothing in the way of abuse of discretion. Furthermore in their cross-complaint defendants averred that the possession of the Government 'would completely destroy' the lands 'by the operation of the dam.' If there was a complete taking or destruction of defendants' property, it would seem obvious that a fee simple title was requisite."

In the *Meyer* case, the Circuit Court found that no persuasive evidence had been produced to show that the lands, sought to be condemned, were actually unnecessary for the purposes of the Act, but that they would be permanently under water as a result of the operation of the dam. The Court found that no proof had been produced to show abuse of discretion by the Secretary of War. The Court stated that, in the absence of bad faith or abuse of discretion, the Secretary's determination was not subject to judicial review. Consequently, the prayers of the condemnation petition were granted.

In the case at bar, the finding on a similar factual question was exactly to the contrary of the finding in the *Meyer* case. Here, petitioner needed none of the lands of the respondents for any of the purposes expressly enumerated in the Act (R 39-40, F. of F. 37). Judge Parker, for the Circuit Court of Appeals, stated this fact thus (150 F. (2) 616, 617, Pars. numbered 4 and 5, R. 203):

> "None of the 44,400 acre boundary, except two or three acres, as to which there is no contest, was needed by the TVA for the purpose of constructing the dam or reservoir. All lay above the high-water level of the reservoir; and it was not proposed to take stone or timber from it or use it in any other way for any of the purposes for which the TVA had been created. It was admittedly being taken to be conveyed to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park, under a con-

> tract with the State of North Carolina and Swain County, as a means of extinguishing the liability of the TVA for flooding the highway."

The petitioner contends that there has been no finding by either of the Courts below of abuse of discretion on the part of T. V. A., in this proceeding. A remark by Judge Webb made early in the proceeding in the District Court has been grasped by petitioner, in an effort to substantiate this contention (Petition, P. 9). We will not pause here to point out Judge Webb's *finding* on the point, but will revert to it hereafter. It seems sufficient at this stage to point out that each of the Courts below flatly held that, in attempting to condemn these lands, T. V. A. went far beyond its authority. Although, exceeding one's authority is perhaps a step beyond what may be strictly an abuse of discretion, the duty of the Courts is, of course, equally clear when a governmental agency attempts either.

In the instant case, the Circuit Court gave expression as follows to its full recognition of the legal principle pronounced in the *Meyer* case:

> "(4, 5) It is well settled, of course, that, ordinarily, the necessity of a taking for public use is a legislative and not a judicial question and, when determined by the legislature, or by an agency created for that purpose, is not subject to review by the courts. Rindge Co. v. County of Los Angeles, 262 U. S. 700, 709, 43 S. Ct. 689, 67 L. Ed. 1186; Bragg v. Weaver, 251 U. S. 57, 58, 40 S. Ct. 62, 64 L. Ed. 135; Shoemaker v. United States, 147 U. S. 282, 13 S. Ct. 361, 37 L. Ed. 170; 18 Am. Jur. 734, 737. It is equally well settled, however, that 'the nature of a use, whether public or private, is ultimately a judicial question.' Rindge Co. v. County of Los Angeles, supra, 262 U. S. at page 705, 43 S. Ct. at page 692, 67 L. Ed. 1186; City of Cincinnati v. Vester, 281 U. S. 439, 446, 50 S. Ct. 360, 74 L. Ed. 950. Consequently, where property is taken in excess of

that required for the authorized public use, the excess to be used for some other purpose, the courts have power so to declare. Cincinnati v. Vester, 6 Cir., 33 F. 2d 242, 68 A. L. R. 831, and note at page 837, affirmed 281 U. S. 439, 50 S. Ct. 360, 74 L. Ed. 950; Warm Springs Irr. Dist. v. Pacific Live Stock Co., 9 Cir., 270 F. 560; Wilton v. St. John's County, 98 Fla. 26, 123 So. 527, 65 A. L. R. 488; Richmond v. Carneal, 129 Va. 388, 106 S. E. 403, 14 A. L. R. 1341, and note at page 1350; Salisbury Land & Imp. Co. v. Com., 215 Mass. 371, 102 N. E. 619, 46 L. R. A., N. S., 1196; Opinion of the Justices, 204 Mass. 607, 91 N. E. 405, 27 L. R. A., N. S., 483."

The only "conflict" between the *Meyer* case and the instant one is in the facts.

The arguments advanced near the end of petitioner's Alleged Reason One * seem to relate more directly to its principal contention in this case (that it is authorized by the Act to condemn respondents' lands) than to the subsidiary question discussed in the first part of the Alleged Reason (that the decisions below are in conflict with the *Meyer* case). Consequently, we will reserve our reply to these arguments for the present.

(2) Petitioner's reason numbered two, for the granting of certiorari, may be summarized as follows:

(a) Its plan for the condemnation of the entire area (the 44,000 acres) will avoid the expenditure of "more than $2,000,000 *and* the leaving of 216 families isolated", without the usual facilities of modern, civilized communities.

(b) To replace Highway 288 will be much less economical and less beneficial to the public generally than is T. V. A.'s plan.

(c) T. V. A.'s plan is the only one acceptable to North Carolina and Swain County.

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* Bottom p. 11-33, Petitioner's Brief.

(d) The "intrusion" by the Courts into T. V. A.'s prerogative of determining the necessity of taking Respondents' lands is in conflict with certain other decisions, cited by Petitioner.

Although none of the contentions, (a), (b), or (c) above, seem to be reasons for granting certiorari, we will reply to each of them briefly, but with such particularity only as seems proper in a reply to an application for certiorari.

(a) Very little reflection is required to observe the fallacy in the statement (a). No record reference nor explanation is given to show how the figure of $2,000,000 was reached. But, if we assume, without conceding that a substitute road, no better than 288, would have cost that much, it is obvious that if such a road had been constructed in a timely and sensible manner, the families in the area would not have been isolated even temporarily, nor would they have been deprived of any of the facilities for living which they had theretofore possessed.

(b) A study and an analysis of the various estimates of the petitioner's witnesses concerning the expense involved, will disclose that petitioner's proposed plan, which, of course, contemplates the construction of a modern highway through this area ultimately, will actually result in no saving to the Government or the taxpayers, but, to the contrary, will cost a great deal more than the expense of constructing a substitute highway for 288 and would exceed the damages for the loss of that road (R. 47-89). This appears particularly clear when it is remembered that relatively a very short stretch of road will be required for the lands of these Respondents. (See Opinions below—R. 21, and 209-210.)

Moreover, if it were actually true that the petitioner's plan would be the more profitable or more economical one for the Government, or even it would be more beneficial

for the public generally, those considerations would not justify condemnation in excess of the actual needs for the purposes expressly authorized by the Act. The question whether a taking is for a "public use" is a judicial question (*Rindge* v. *L. A. County*, 262 U. S. 700; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Shoemaker* v. *U. S.*, 147 U. S. 282; 18 Amer. Jur. 734, 737). To take the Respondents' lands for the reason and the purpose here proposed, would constitute an "excess taking" and clearly unlawful. *Cincinnati* v. *Vester*, 33 F. (2) 242, 68 A. L. R. 831, 835,[3] aff'd. 281 U. S. 439, 446. See also Annotation in 68 A. L. R. 837; *Wilton* v. *St. Jones County*, 98 Fla. 26, 123 So. 527, 65 A. L. R. 488; *Richmond* v. *Carneal*, 129 Va. 388, 106 S. E. 403, 14 A. L. R. 1341 and Annotation at 1350.

(c) The plan proposed by T. V. A. (1) enabled the County immediately to meet its bond indebtedness of $400,000.00, (2) relieved the State of North Carolina of its obligation to maintain Highway 288 or any substitute therefor, and (3) contemplated conversion of a large area into a park, expected to become an attraction to many motorists from other States, and (4) likewise contemplated the construction of a first-class road, at the expense of the Federal Government, to become a link in North Carolina's chain of highways.

Perhaps the petitioner exaggerates somewhat when it contends that the proposed plan was the "*only*" one acceptable to the State, and the County. However, in all probability, the proposed plan did appeal very strongly to

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[3] The uniform rule was stated in *Cincinnati* v. *Vester*, by C. C. A. (6) as follows:

> "In none of them has the use been found to be of a public character because of financial benefits to the condemnor or taker, as such, but it uniformly has been made to depend upon a use so dominantly and directly related to the public as to be indispensable to its welfare. That cannot be said in these cases."

both the State and the County. We know of no reason why they should not have approved of it, wholeheartedly. But, of course, that furnishes absolutely no justification whatever for the acquisition of the lands of the Respondents, since, as will be seen, it would have constituted what the Courts have characterized as an "excess taking".

(1) We come now to the only legal proposition advanced by petitioner, within its reason numbered two, viz., that the decisions below conflict with those cited in the Petition.

As a preface to that proposition, petitioner asserts that if settlement had been made with these Respondents by the payment of damages for the loss of 288, instead of following the customary method in such cases, of supplying a substitute means of access, the value of Respondents' lands would have been substantially destroyed, and the damages would have approximated the value of the fee. That result, says petitioner, is undisputed.

Perhaps the lands would have had some little value under such circumstances. The point is not worth laboring. Judge Webb's comment, made during the testimony of T. V. A.'s witness, Mehinick, is interesting and perhaps the natural one.[4]

The original method of making landowners whole in such cases was by the payment of money damages.[5] However, the Courts have grafted upon the original doctrine of compensation, "compensation by substitution,"[6] and that

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[4] "The Court: I don't think anybody but a moron would have given up his right to use the road (meaning, of course, *some* road), to start with."

[5] Nichols on Eminent Domain (2nd Ed.), Vol. 1, Section 205, p. 625; Lewis on Eminent Domain (3rd Ed.), Vol. 2, § 756.

[6] *Feltz* v. *Central Nebraska Public Power and Irrigation District*, 124 F. (2) 578 (C. C. A. 8—1942); *Brown* v. *U. S.*, 263 U. S. 78; *Patapsco* v. *Western Md. R. R. Co.*, 119 Md. 673, 87 Atl. 917 (Ct. of App. of Md.—1913); *Dohany* v. *Rogers* (D. C. Mich.), 33 F. (2) 918, aff'd. 281 U. S. 362, 74 L. Ed. 904; 18 Amer. Jur. 711, ch. 80; 68 A. L. R. 442.

method of compliance with the requirement of the "Just Compensation clause" of the Fifth Amendment has, of course, been uniformly sanctioned by the Courts in recent times.[6]

Consequently, the original method (payment of money damages) is now not the only recognized method. If the authorities listed on Page 15 of the Petition are cited to support a claim that destruction of the only means of access to land justifies the taking of the land, our reply is that an examination of those authorities discloses that none of them so hold.[7]

Petitioner states that there has been no finding in this case that the determination, by its Board of Directors that condemnation of respondents' lands was necessary to carry out the purposes of the Act was made in bad faith or constituted an abuse of discretion. In reply to the Alleged Reason numbered one, we have commented somewhat on that subject;[7a] but perhaps further notice of it should be taken here, since the statement appears under Alleged Reason Two.

It is true, as alleged in the Petition,[8] that, while T. V. A. was introducing its testimony, Judge Webb seemed to look favorably upon the plan to convert the 44,000 acres into a park and to build a modern highway through it.[9] From the viewpoint of a North Carolinian—unless he owned property in the area—T. V. A.'s plan probably appealed to the Judge, at least at first blush.

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[7] *Schiefelbein* v. *United States*, 124 F. 2d 945 (C. C. A. 8); *Union Electric Light & Power Co.* v. *Snyder Estate Co.*, 65 F. 2d 297 (C. C. A. 8); *Hiatt* v. *City of Greensboro*, 201 N. C. 515; *Davis* v. *Alexander*, 202 N. C. 130; Annotations, 49 A. L. R. 330 and 93 A. L. R. 639.

[7a] Page 10, supra.

[8] Petition, P. 15.

[9] Footnote, p. 15 of Petition, and R. 81 and 89.

The Statute [10] expressly authorizes T. V. A. to condemn all property which it deems necessary "*for carrying out the purposes of this Act.*" T. V. A.'s Board of Directors passed a resolution declaring respondents' lands to be necessary for the purposes of the Act. Without pausing here to point out the bases (factual or legal) for the decisions of the Courts below—to which we will address ourselves hereinafter—it will suffice to say, in reply to petitioner's assertion (that no bad faith or abuse of discretion by T. V. A. was found by the Courts below), that each of those Courts found and expressly stated that none of these lands were needed for any purpose authorized by the Statute. [11] [12] Implicit in each of the decisions below is a positive finding of abuse of discretion.

We pass now to petitioner's contention proper that, in rejecting its "Board's good faith determination of necessity, the decision below is in conflict with the decisions of this Court in *Rindge Co.* v. *Los Angeles County,* 262 U. S. 700, 708-710; *Joslin Co.* v. *Providence,* 262 U. S. 668; *Bragg* v. *Weaver,* 251 U. S. 57; *Sears* v. *Akron,* 246 U. S. 242; *Shoemaker* v. *United States,* 147 U. S. 282; and *United States* v. *Gettysburg Electric Ry.,* 160 U. S. 668."

In *Rindge Co.* v. *L. A. County* (*supra*), lands were sought to be condemned for use as public highways. This Court

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[10] T. V. A. Act, Sec. 4(i), Title 16 U. S. C. A. 831 c(i) (See R. 113, and Appendix hereto, Pp. 1 and 2).

[11] R. 39-40 (F. of F. 37 and 38)—District Court's findings.

[12] The statement of the C. C. A. is as follows (R. 207):

"In the case at bar, the only land which it was necessary for the T. V. A. to take for the statutory project was the land covered by its reservoir. In taking this it flooded the highway affording access to the lands in question. This it had the right to do and to condemn the highway and any easements over it appurtenant to the lands to which it afforded access. To condemn the lands themselves, however, was excess condemnation, as they were not needed for any purpose authorized by the statute."

there stated that, "The two fundamental questions involved are whether the uses for which these lands have been taken are public uses authorized by law; and whether the taking was necessary to such uses." The facts were similar to those in the *Meyer* case, *supra*.[13] A finding that the lands of Plaintiffs in Error, in the *Rindge* case, were actually necessary *for use as a public highway* was made, not merely by Los Angeles County, but by the local, and the appellate State Courts; and this Court held that it would not disturb those findings. The determinative finding of fact in the *Rindge* case was the diametric opposite of the finding of the fundamental fact in the case at bar. Here, T. V. A. *contends* that the use proposed for respondents' lands is authorized by the T. V. A. Act. The fact is, however, as was found by the Courts below, that the Act nowhere authorizes a taking for such a purpose. It will be remembered that, if condemned, these lands are "to be conveyed to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park * * * as a means of extinguishing the liability of T. V. A. for flooding the highway."[14] The only conflict between the decision in the *Rindge* case and the instant one is in the facts.

The only question in *Joslin Co.* v. *Providence*, 262 U. S. 668,[15] comparable to any of the questions raised in the instant case is whether the *necessity* for taking property for *"public use"* is a legislative or a judicial question. When we come to petitioner's alleged Reason numbered Three, it will be seen that the term "public use" has uniformly been used by the Courts in a somewhat limited or technical sense and has not been accorded either a broad or a literal

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[13] See Pp. 7 hereof. discussion of *U. S.* v. *Meyer*, 113 F. (2) 387, cert. denied, 311 U. S. 706.

[14] R. 39, 40—Finding of Fact 37.

[15] Cited on p. 16 of Petitioner's Brief.

meaning. It is not used in the sense of public utility, public interest, common benefit, or general advantage or convenience, nor synonymously with the more indefinite term, "public improvement". It is used as a brief way of saying, a use authorized by the particular statute under consideration.[16] With that construction or meaning of "public use" clearly in mind, it will be readily seen that there is no conflict between this Court's decision in the *Joslin* case and the decision of the Court below in the case at bar. The principle of law on which this Court approved the taking in the *Joslin* case was expressly recognized by the Circuit Court of Appeals in its opinion in the case at bar.[17]

Bragg v. *Weaver*, 251 U. S. 57, with which petitioner also claims the decision below to be in conflict,[18] involved the taking of earth to be used in repairing a public highway. The taking was from defendant's land adjoining the highway, the nearest, the most convenient and the cheapest place to get it. The taking was authorized by a Virginia statute, i.e. was for a "public *use*". This Court affirmed the decision of the Virginia Courts, holding that the expediency of the taking was for the legislative body, and not for the Courts to decide. The Courts below in the case at bar departed not one inch from the rule followed in the *Bragg* case.

It was held in *Sears* v. *Akron*, 246 U. S. 242, 251, that the determination of the *necessity* for taking land for "*public use*" is a legislative function. There is no conflict on that question between the *Sears* case and the instant one.[19]

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[16] See *Bloodgood* v. *Mohawk & H. R. Co.*, 18 Wend. 9, 31 Am. Dec. 31. 356, and other cases cited infra in our discussion of Alleged Reason 3.

[17] See paragraph of Opinion beginning at bot. p. 206 of Record and extending just below middle of p. 207.

[18] Petitioner's Brief, p. 16.

[19] See again R. 206, 207.

Shoemaker v. *U. S.*, 147 U. S. 282, is authority for the same proposition as are *Bindge Co.* v. *L. A. County*, *Joslin Co.* v. *Providence*, *Bragg* v. *Weaver*, and *Sears* v. *Akron*, all discussed *supra*,[20] viz., that the determination, whether the use proposed to be made of private property is a "*public use*," is a judicial function; and that, if that question be decided in the affirmative, the *extent* to which such property shall be taken *for such use* is for the legislature to decide. The rule was given full recognition by the Courts below in the case *sub judice*, as we have repeatedly pointed out in our discussions above regarding the other cases cited by petitioner.[21]

In *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, cited by petitioner,[22] Acts of Congress authorized condemnation of property for a national cemetery at Gettysburg, Pennsylvania, on the site of the battlefield. The proposed condemnation was held to be for a purpose specified in the statute, i.e. for a "public use". The decision was in accordance with the rule announced in the other cases involving "necessity" and "public use" discussed hereinabove, and the rule was followed by the Court below in the present case.

Petitioner states[23] that:

> "The intrusion of the court below into the legislative task, delegated to the Authority's Board of Directors, of determining the necessity for a taking is also in conflict with the decisions in United States v. Meyer, 113 F. 2d 387 (C. C. A. 7), certiorari denied, 311 U. S. 706; Barnidge v. United States, 101 F. 2d 295 (C. C. A. 8); United States v. Threlkeld, 72 F. 2d 464 (C. C. A. 10), certiorari denied, 293 U. S. 620; and Atlantic Coast

[20] See Pp. 16-19 hereof.

[21] See Pp. 16-19 hereof, and R. 206, 207.

[22] Petitioner's Brief, p. 16.

[23] Middle p. 23, Petitioner's Brief.

Line R. Co. v. Town of Sebring, 12 F. 2d 679 (C. C. A. 5)."

We have already discussed the decisions in the first of the above cases (*U. S.* v. *Meyer*) at length.[24] No additional discussion seems necessary to show that the difference between that case and the instant one is in their opposite factual situations, and that the same principles of law were pronounced and followed in each.

In *Barnidge* v. *United States*, *supra*, while the term "public use" seemed to be used synonymously with "necessity", which was a departure from the construction of those terms in the several other cases cited by petitioner, a careful analysis of the opinion discloses that, again, the fundamental difference between that case and the one under consideration here is in the facts. In the *Barnidge* case, the Circuit Court of Appeals (8) found, as a fact, that the land sought to be condemned was to be used for a purpose actually authorized by the *Historic Sites Act*.[25] This finding was, of course, the opposite of what we have seen to have been the findings of the Courts below in the instant case. Then, there is the further difference that, in the *Barnidge* case, the Court at times used the terms "necessity" and "public use" synonymously. To that extent the opinion—not the decision—differs, not only from the decisions below in the present case, but likewise, from the several opinions of this Court cited and discussed hereinabove and other opinions of this Court and of other Courts cited *infra*.

Petitioner states that the decision in *United States* v. *Threlkeld*, 72 F. (2) 464, is another with which the decision below is in conflict.[26] The pronouncements of the general

[24] See Pp. 7-11 hereof.

[25] See 101 F.(2), pars. (10), (11), (12), and (13-15) on Pp. 295-299

[26] See Petition, p. 16.

principles of law, which we have discussed in the several paragraphs above (i.e. legislative determination of "necessity" and judicial determination of "public use") are identical in the *Threlkeld* case and in the decisions below here. There is no distinction between them worthy of comment here, or worthy even of notice for that matter.

The same is true of *Atlantic Coast Line R. Co.* v. *Town of Sebring*, 12 F.(2) 679. (See p. 681).

(3) Petitioner's Alleged Reason numbered Three seems actually to be a continuation of its Reason numbered Two, or at least of what we have called "(d)" thereof, the "in conflict" argument.[27] The only distinction appears to be that, in its Reason numbered Three, the "in conflict" argument is extended to two more cases, viz., *Brown* v. *U. S.*, 263 U. S. 78, and *Dohany* v. *Rogers*, 281 U. S. 362.

Since petitioner seems to rely chiefly upon the decisions in the *Brown* case, the *Dohany* case and the *Meyer* case and has given special attention to the *Brown* and the *Dohany* case in its Reason Three, we will now discuss those two cases.

The first of them chronologically is *Brown* v. *U. S.*, *supra*. The damming of the Snake River flooded three-fourths of the town of American Falls, Idaho. The Act of Congress there *specifically authorized the condemnation of sufficient land for a new town-site, to replace the flooded portion*, also expressly provided for the removal of the buildings to the new site, and finally, for the sale of any lots remaining in the area condemned, not used in exchange for the flooded lands. Brown opposed the condemnation, contending that, the object being to condemn his land for exchange and or sale to another, it was not for a "public use", but was unconstitutional. This Court, in affirming the decision below, pointed out that the town was an in-

[27] See (d) on p. 14, *supra*.

portant one for its section; that three-fourth of its streets, alleys and parks would have to be abandoned, as would many of the buildings (private and public) in the portion to be flooded unless they could be moved to new locations nearby, and that because of the topography of the land, they could be moved only to the gradually rising ground east of State River; that the land sought to be condemned was the only available place to which the flooded part of the town could be moved practicably so as to be united with the one-quarter remaining; and that the acquisition of the new townsite was expressly authorized by the Act and was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one.

In *Dohany* v. *Rogers*, 281 U. S. 362, the Highway Commission of Michigan, in reconstructing and widening a road, adjoining for several miles a railroad right-of-way, contracted to acquire the right-of-way in exchange for certain other lands, sought to be condemned for relocation of the railroad. The appellant, whose lands were sought, brought suit to enjoin the condemnation thereof. It will be observed at once that the facts here are comparable to those in the *Brown* case, *supra*. In both the *Brown* and the *Dohany* cases, the method followed was what Chief Justice Taft, in the first of those two cases, characterized as "substituted compensation", which is exactly the procedure, we respectfully submit, that should now be followed in the instant case.

If, in the present proceeding, as occurred in *Public Power Central Nebraska Public Power Co.*, 124 F. (2) 57[illegible] A. 8—1942), and in so many other similar situations since *Brown* v. *U. S.* (See R. 61), the condemning agency were seeking to acquire lands of the respondents for a right-of-way to replace 288, we would certainly not be here objecting. Such a method would, if followed, enable T. V. A.

to meet its remaining liability to North Carolina and to Swain County, and to these landowners, for the loss of 288. It will be relatively very inexpensive, because respondents Burns and Welch have definitely waived their claim for any substitute highway or for damages; the damages suffered by the other respondents have been relatively small to date; and, finally, the cost of replacing 288 from the Nolands Creek Road to Bryson City (which will meet the needs of the remaining respondents and will fully satisfy them) will be almost negligible, comparatively speaking (R. 21, 209-210).

4. Petitioner advances as its fourth reason for the granting of the writ, a contention that it is important that Government agencies, engaged in the construction of dams and reservoirs, be permitted by the *Courts* to condemn private property for such purposes and uses as those for which these lands are sought.

Petitioner refers again here to the report of the Minority Members of the House Military Affairs Committee, made in 1935, regarding the addition of Section 31 of the Act.

It seems significant, though, of course of no moment from the standpoint of the legal principle involved, that, although T. V. A. itself has been the agency actually engaged in carrying out all of the projects of various types under this Act, it makes no specific reference whatever in its petition to a single project or occasion on which it has been deemed important to acquire areas comparable in size to that under consideration here for any such purpose or use as is here proposed. On the contrary, T. V. A. seems able only to point to an extract from the report of the Minority Members of the House Committee in 1935, wherein they refer to three situations in which they say that it has been found much cheaper to *buy up* little isolated penin-

sulas than to construct new roads along the steep mountain sides.

The report of the Majority Members of the same committee, relating to Section 31 of the Act is of interest here.[28] When the Minority Report is read in full, one is able to get a much better perspective of what even those members of the committee advocated, than from the short extract therefrom on page 13 of the Petition.[29]

Finally, it will be seen that Section 31, as ultimately enacted, contains no provision authorizing T. V. A. to condemn lands for any purposes other than, or in addition to those theretofore specified in the Act. On the contrary, after directing that, in carrying out the purposes of Congress "to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare", the Act shall be liberally construed, Section 31 then directs that "no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land"; and finally it contains this proviso: "*Provided*, That any land *purchased* by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder."* (Italics supplied.)

It will be observed that the references to the "little peninsulas" mentioned in the report of the Minority of the House Committee, and to the excess lands spoken of in the

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[28] See p. 34 of Appendix hereto.

[29] See H. R. 8632, quoted in Appendix hereto, p. 35.

* (R. 159 and APP. hereto, p. 34.

Majority report and in Section 31 itself,[30] all relate to excess lands which may have been "*purchased*". Perhaps it may be argued, from the presence of these references, that Congress thus inferentially granted to T. V. A., the power to purchase, in small quantities, some excess lands, within the limitations indicated in Section 31. Whatever may be true about that, it is obvious that neither the minority were urging, nor were the majority considering any proposal that the T. V. A. be authorized to *condemn* any such quantity of land, in addition to that actually needed for its projects, as is proposed in the case at bar. We do not believe that even our Adversaries seriously contend that the area which they contracted to buy or even the portion thereof which they now seek to condemn is "a little peninsula" such as was mentioned and was favored by the minority of the committee. Furthermore, of course, there is nothing in Section 31 which, even by inference, can be said to authorize such a disposition of excess lands as is proposed here.

Moreover, nowhere in these reports or in this section of the Act itself is there anything to indicate that Congress had the slightest intention to authorize the authority to *condemn* lands in excess of its needs for the actual construction and/or maintenance of its projects.

It is, of course, elementary that there is a vast distinction between the right or authority, on the one hand, to purchase land, and the power, on the other, to condemn it. The right to *purchase* private property from willing sellers is, of course, given by Congress in many instances where a taking against the owners' will would not be authorized by the Act, or condoned by the Courts. Attention should be called here to the fundamental rule that statutes under which authority

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[30] See Appendix hereto, pp. 34-36.

to condemn is claimed must be closely scrutinized and strictly construed, against the condemnor.[31]

The Courts have consistently held that the discretion given to Legislative bodies, in selecting property for condemnation, does not authorize condemnation of property for purposes beyond those expressly enumerated in the statute. Such a taking would be in violation of the Fifth Amendment to the Federal Constitution.[31½]

Finally, petitioner urges, as a reason for granting certiorari, that "An intelligent handling of the problems of readjustment arising out of the flooding of lands by an authorized dam can be had only if the Governmental agency which must deal with such problems is not too closely confined with respect to the particular means which may be adopted in their solution." This seems to be a plea that the Courts ignore their duty of determining whether private property, sought to be condemned by a Governmental agency, is sought for a purpose or a use for which Congress has authorized condemnation. It is of the nature of a demand that, not only determination of the *extent* or the *expediency* of the condemnation of the particular lands be left to the discretion of T. V. A., but that it be permitted to exercise the judicial function of determining the question of "*public use*". If such a power should be granted to T. V. A. and if it could be granted without contravening the Federal Constitution—which seems extremely doubt-

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[31] *State* v. *Gulledge*, 208 N. C. 207 (Supreme Court of North Carolina); *Refining Company* v. *Elevator Company*, 82 Mo. 121; *Herrey* v. *Railroad*, 174 Ill. 295; *Martin* v. *Rushton*, 42 Ala. 289; Cooley's Constitutional Limitations, 763.

[31½] *In re.* Winnisimet Company (Supreme Judicial Court of Mass.—1911), 209 Mass. 1, 95 N. E. 293, 294; *Mayo* v. *Windels* (N. Y. App. Div.—1938), 255 A. D. 22, 5 N. Y. S. (2) 690; Lewis on Eminent Domain (3rd Ed.—1909), Vol. 1, Sec. 311, and Vol. 2, Sec. 600; Cooley on Const. Lim. 8th (Ed.), Vol. 2, Ch. 15, p. 1147.

ful—then, of course, Congress, and not the Courts, should grant it.

On Page 17 of the Petition it is argued that the decision of the Court below, in rejecting T. V. A.'s decision that these lands are sought for an authorized use, results in confusion. We respectfully suggest that, on the contrary, the decision below and the opinion explaining the bases therefor, as was true of the several decisions of this Court and others discussed herein, clearly define the limit beyond which Governmental agencies may not go without exceeding their power under the Acts and or without violating Constitutional provisions. Such decisions should, we submit, serve as useful guides to such institutions as T. V. A., and are actually the only protection remaining to citizens against the whims and desires of Government agents in their enthusiasm, on occasions.

(B) Summary of Reasons for Refusing This Writ

In the course of our replies to the arguments of petitioner, we have indicated, and, in some instances, have argued the reasons for the refusal of certiorari in this case. However, perhaps it would be helpful, in conclusion, for us to summarize those reasons briefly.

They are as follows:

(1) There is no conflict between the decisions below, on the one hand, and those of this Court or of other Circuit Courts of Appeals, on the other.

(2) Petitioner concedes that respondents' lands are sought solely to be conveyed to the Department of the Interior for park purposes, as a means of satisfying T. V. A.'s liability for the flooding of Highway 288.

(3) The purposes for which T. V. A. was created, so far as its relation to the Tennessee River Basin is concerned, is stated in the Act to be the improvement of

navigation and flood control.[32] T. V. A. is authorized by the Act to condemn all property that it shall deem necessary for *carrying out the purposes of the Act.*[33] The lands in question are not sought for any of the purposes enumerated in the Act.

(4) The determination by T. V. A. that the use for which these lands are sought is authorized by the Act is subject to judicial review.

(5) From the standpoint of common-sense, and in the light of the decisions in the decided cases most comparable to this one, the proposed use is *not a "public use"*.[34] The fact that, if condemned, the lands will ultimately be used "for a purpose for which there could have been an appropriate condemnation" does not justify the proposed taking.[35]

(6) Even if practical considerations indicated the advisability of the proposed taking, it is still prohibited here because of lack of statutory authority, and by Constitutional limitations. Moreover, neither economy nor convenience dictates T. V. A.'s proposals, insofar, at least, as respondents' lands are concerned.[36]

(7) Finally, if the condemnation of the land in question for the Park would be in the public interest, it can be accomplished by lawful means.[37]

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[32] R. 108, Appendix hereto, p. 30.

[33] R. 113, Appendix hereto, p. 33.

[34] *Richmond* v. *Carneal*, 129 Va. 388, 106 S. E. 403, 14 A. L. R. 1341 and note at 1350; *Salisbury Land & Imp. Co.* v. *Com.*, 215 Mass. 371, 102 N. E. 619, 46 L. R. A. (N. S.) 1196; Opinion of the Justices, 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483; 18 Amer. Jur. 736, 737.

[35] *Cincinnati* v. *Vester*, 281 U. S. 439, 448, aff'g. 33 F. (2) 242, 68 A. L. R. 831, and note at 837.

[36] See R. 21, 209-210.

[37] R. 20-21, and 210, citing *Yarborough* v. *N. C. Park Comm.*, 196 N. C. 284, 145 S. E. 563, 569; the Weeks Law; *Hanson Lumber Co.* v. *U. S.*, 261 U. S. 581, 587; *U. S.* v. *So. P. Co.* (C. C. A. 4), 31 F. (2) 852, 856.

Conclusion

Because the Petition contains no sound reason for the granting of the Writs of Certiorari, and further because several affirmative reasons for refusing them are apparent, the petitioner's application should be denied.

Respectfully submitted,

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APPENDIX

The following include the sections of the T. V. A. Act which both sides agree to be pertinent in this proceeding, and those alleged by either the Petitioner or the Respondents to be pertinent:

Opening Sentence of Act (Title 16 U. S. C. A., Sec. 831)—

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is hereby created a body corporate by the name of the 'Tennessee Valley Authority' (hereinafter referred to as the 'Corporation')."

Powers of T. V. A.

Section 4(h) (Title 16, 831c(b)):

"(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act."

Section 4(i) (Title 16, 831 c(i)):

"(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures, and navigation

projects at any point along the Tennessee River, or any of its tributaries, and in the event "that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings (48 Stat. 60-61): PROVIDED, That nothing contained herein or elsewhere in this Act shall be construed to deprive the Corporation of the rights conferred by the Act of February 26, 1931 (46 Stat. 1422, ch. 307, secs. 1 to 5, inclusive), as now compiled in section 258a to 258e, inclusive, of Title 40 of the United States Code. (49 Stat. 1075.)"

Section 4(k) (Title 16, 831 c(k) (a-d):

"(k) Shall have power in the name of the United States—

(a) to convey by deed, lease, or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose;

(b) to convey by deed, lease, or otherwise, the possession and control of any such real property to any corporation, partnership, person, or persons for the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: PROVIDED, That no transfer authorized herein in (b) shall be made without the approval of Congress; AND PROVIDED FURTHER, That said corporation, without further action of Congress, shall have power to convey by deed, lease, or

otherwise, to the Ingall Shipbuilding Corporation, a tract or tracts of land at or near Decatur, Alabama, and to the Commercial Barge Lines, Inc., a tract or tracts of land at or near Guntersville, Alabama:

"(c) to transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United States: PROVIDED, HOWEVER, That no land shall be conveyed, leased, or transferred, upon which there is located any permanent dam, hydroelectric power plant, or munitions plant heretofore or hereafter built by or for the United States or for the Authority except that this prohibition shall not apply to the transfer of Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, or to Waco Quarry: AND PROVIDED FURTHER, That no transfer authorized herein in (a) or (c), except leases for terms of less than twenty years, shall be made without the approval of the President of the United States, if the property to be conveyed exceeds $500 in value; and

(d) to convey by warranty deed, or otherwise, lands, easements, and rights-of-way to States, counties, municipalities, school districts, railroad companies, telephone, telegraph, water, and power companies, where any such conveyance is necessary in order to replace any such lands, easements, or rights-of-way to be flooded or destroyed as the result of the construction of any dam or reservior now under construction by the Corporation, or subsequently authorized by Congress, and easements and rights-of-way upon which are located transmission or distribution lines. The Corporation shall also have power to convey or lease Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, and Waco Quarry, with the approval of the War Department and the President."

Section 4(l) (Title 16, 831c(l)):

"(l) Shall have power to advise and cooperate in the readjustment of the population displaced by the

construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act; and may cooperate with Federal, State, and local agencies to that end. (49 Stat. 1080.)"

Section 18 (Title 16, 831q):

"Sec. 18. In order to enable and empower the Secretary of War, the Secretary of the Interior, or the board to carry out the authority hereby conferred, in the most economical and efficient manner, he or it is hereby authorized and empowered in the exercise of the powers of national defense in aid of navigation, and in the control of the flood waters of the Tennessee and Mississippi Rivers, constituting channels of interstate commerce, to exercise the right of eminent domain for all purposes of this Act, and to condemn all lands, easements, rights of way, and other area necessary in order to obtain a site for said Cove Creek Dam, and the flowage rights for the reservoir of water above said dam, and to negotiate and conclude contracts with States, counties, municipalities, and all State agencies and with railroads, railroad corporations, common carriers, and all public utility commissions and any other person, firm, or corporation, for the relocation of railroad tracks, highways, highway bridges, mills, ferries, electric-light plants, and any and all other properties, enterprises, and projects whose removal may be necessary in order to carry out the provisions of this Act. When said Cove Creek Dam transmission line, and power house shall have been completed, the possession, use, and control thereof shall be intrusted to the Corporation for use and operation in connection with the general Tennessee Valley project, and to promote flood control and navigation in the Tennessee River."

Section 25 (Title 16, 831x):

"Sec. 25. The Corporation may cause proceedings to be instituted for the acquisition by condemnation

of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America. * * *"

Section 31 (Title 16, 831dd):

"Sec. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: PROVIDED, That any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4(k) of this Act."

Report of Majority of House of Representatives Committee on Military Affairs, Re. Section 31 of Act:

"The vital and controversial part of this section will be found in the latter part thereof stipulating that no real estate shall be acquired or held by the Authority except what is necessary to carry out its plans and projects actually decided upon requiring the use of such real estate. There is a proviso also that any land that has been purchased by the Authority

and whose ownership is not necessary to carry out the plans and projects of the Authority actually decided upon, then that such land shall be sold by the Authority as the agent of the United States, after due advertisement, at public auction to the highest bidder. It is manifest that the Authority should not go into the real-estate business. The buying and selling of real estate not actually necessary for carrying out actual plans of navigation and flood control would have no proper logical or legal relation to regulating interstate commerce.

Therefore, section 11 should and will be construed in connection with section 3 of this bill. Any lands that the Authority has and does not need for such actual development should be sold, and all property of the United States should be sold, only after "due advertisement at public auction to the highest bidder for cash. The Government cannot afford to play favorites among any of its citizens. The buying and selling of land not necessary for developing navigation, and having no proper logical and legal connection therewith cannot be constitutionally authorized nor constitutionally exercised. Any lands actually needed can be acquired by eminent domain."

Supplemental Views of Mr. Kvale and Mr. Maverick on H. R. 8632 (Minority Report):

"The actual provisions of this section, as reported by your committee, prohibit the purchase of any land not 'actually necessary to carry out plans and projects actually decided upon requiring the use of such lands.' It also requires the Authority to sell immediately any land which it has already acquired and which it does not need for carrying out plans 'actually decided upon'.

In the development of the Norris, Wheeler, and Pickwick Reservoirs, it has been necessary and economical to buy areas outside the water line. A program of soil protection and forestation essential to the protection of the reservoirs is being developed for these lands, but cannot wisely be adopted until further work has

been done on it. These lands were not purchased haphazardly. It was efficient and economical to acquire them at the same time that the Corporation's other land acquisition was accomplished.

For example, in some sections in the reservoir areas, little peninsulas of land are necessarily isolated. The reservoir waters will flood out the old valley roads which formerly gave access to these sections. It has been found much cheaper to buy up the lands in peninsulas than to construct new roads along the steep mountain sides.

To require the immediate sale of such lands, pending completion of final plans for their use, would constitute a great waste and great financial loss to the United States; and to prohibit the acquisition of such lands, obviously, would greatly increase the cost of the project."